EXHIBIT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

Petition for Declaratory Ruling that the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service	))))	WC Docket No. 09-154

REPLY COMMENTS OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, DUKE ENERGY CORPORATION, SOUTHERN COMPANY, AND XCEL ENERGY SERVICES INC.

Sean B. Cunningham
Hunton & Williams LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 778-2225

Counsel for the Electric Utilities

October 9, 2009

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

Petition for Declaratory Ruling that the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service	))))	WC Docket No. 09-154

REPLY COMMENTS OF THE ELECTRIC UTILITIES

American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc. (collectively "the Electric Utilities")[1] hereby respectfully submit their Reply Comments in response to opposing comments filed pursuant to the Commission's Public Notice in the above captioned proceeding.[2] In their Petition for declaratory ruling, the Petitioners request that the Commission clarify that the telecommunications rate formula ("Telecom Rate"),[3] which applies to jurisdictional pole attachments used for traditional telephone service, also applies to cable system pole attachments used to provide interconnected voice over internet protocol ("interconnected VoIP" or "VoIP") service.[4]

---

[1] The Electric Utilities are a group of four companies that serve electric consumers in 23 states and numerous metropolitan areas and own and maintain large numbers of poles with third-party attachments. The Electric Utilities serve both urban and rural areas in 18 of the 30 states in which pole attachments are regulated by the Commission.

[2] *Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154 (hereinafter "VoIP Petition Proceeding"), Public Notice (issued August 25, 2009).

[3] VoIP Petition Proceeding, Comments of the Electric Utilities (filed September 24, 2009) ("Electric Utilities Comments").

[4] The Petition focuses on attachments by cable systems. Attachments by competitive local exchange carriers ("CLECs") are already covered by the Telecom Rate. As explained in these Comments below, incumbent local exchange carriers ("ILECs") are excluded from the definition of "telecommunications carrier" in section 224 of the Communications Act (47 U.S.C. § 224(a)(5)) and, accordingly, ILEC attachments on electric poles are not subject to the Commission's pole attachment jurisdiction.

SUMMARY

The Petition asks the Commission to declare a point of law: that the nondiscrimination language of section 224(e) of the Communications Act requires that the Telecom Rate applies to all cable system pole attachments used to provide interconnected VoIP. Although the plain text of the statute compels assent to this legal conclusion, the Commission has not clarified that the Telecom Rate applies to such attachments. In the absence of such ruling, cable companies continue to claim that they are entitled to the historic cable rate even when they provide VoIP telephone services that are "functionally equivalent"[5] to the traditional telephone services provided by their CLEC competitors. As a result, non-productive disputes between cable companies and electric utilities persist, while cable companies continue to reap a discriminatory, market-distorting advantage relative to their CLEC competitors in the form of a subsidized pole attachment rate. Therefore, the Commission can and should act promptly with a declaratory ruling to clarify this legal issue.

Virtually ignoring the point of law raised in the Petition, the Cable Industry's comments on the Petition instead seek to lead the Commission into a thicket of procedural delay, inapplicable case law, and conclusory economics. The cable commenters and other opposing commenters are wrong on every point:

1. Cable commenters claim that the issues raised in the Petition should be resolved in a rulemaking proceeding. They are wrong. The Petition requests a legal ruling to clarify that the Telecom Rate applies to attachments used for VoIP. Reaching a conclusion on the issue presented does not require rewriting the regulations, establishing a new rate

[5] VoIP Petition Proceeding, Petition of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc at 7-11 (filed August 17, 2009) ("VOIP Petition").

formula, or resolving broader policy issues surrounding the classification of VoIP for other regulatory purposes.

2. Cable commenters claim that regulatory parity can be achieved by putting all pole attachments under the Cable Rate and setting aside the Telecom Rate. They are wrong. The statute is clear on two pertinent points: (1) all attachments used by telecommunications carriers are subject to the Telecom Rate without exception; and (2) pole attachment rates must be "nondiscriminatory." Nondiscriminatory simply means "the same" treatment regardless of the status of the attacher. The only logical conclusion one can reach when reading the statute is that CLECs providing traditional telephone service and cable companies to providing VoIP telephony must be subject to the same rate—i.e., the Telecom Rate. The only entity that has a statutory claim to the historic Cable Rate is the cable system whose attachments are used "solely" to provide cable service, as expressly provided by the statute.
3. Cable commenters claim that the Commission can and should achieve regulatory parity by "forbearing" from applying the Telecom Rate to telecommunications carriers and, instead, applying the Cable Rate to all such carriers. They are wrong. The Commission's forbearance authority under the Communications Act provides only limited ability to refrain from "enforcing" certain provisions. It is not an open-ended power to impose new regulations in lieu of existing law. In any event, the suggestion that the Commission engage in "regulation by forbearance" in this matter runs directly counter to the current Commission's efforts to bring greater transparency and clarity to the forbearance process.
4. Cable commenters argue that cable VoIP attachments should be subject to the Cable Rate because the Federal Courts have "upheld" the Cable Rate as a just and reasonable rate.

This argument is irrelevant to the issue of nondiscrimination under section 224(e) and ignores the fact that the Courts have upheld the Telecom Rate as just and reasonable.

5. Cable commenters claim that the Federal courts have "found" that the Cable Rate is more than fully compensatory and that, therefore, the Cable Rate is not a subsidy rate. Whether the Cable Rate is a subsidy does not control the legal issue of discrimination under section 224(e). In any event, they are wrong. None of the cases they cite mention subsidies—one case does not even address the Cable Rate. The text, structure, and legislative history of section 224 show that the Cable Rate is, indeed, a subsidy rate.
6. Cable commenters claim that, as a matter of economics, the Cable Rate is not a subsidy because it compensates pole owners for marginal cost. Whether the Cable Rate is, in economic terms, a subsidy is irrelevant to the issue of discrimination under section 224(e). In any event, they are wrong. In utility ratemaking economics, marginal cost is not the correct measure for determining whether a rate provides a subsidy. Significantly, the Telecom Rate, which Comcast's own economist has testified is "economically appropriate," is not based on marginal cost.
7. Cable commenters claim that applying the Telecom Rate to VoIP attachments will substantially increase costs for cable customers and deter broadband deployment. They are wrong. The figures they cite are exaggerated and distorted, contradict their claims that pole attachment rates minimally impact electric consumers, and fail to account for the far greater impact of non-pole attachment costs of broadband deployment. If one were to suspend reality and take their estimates seriously, such estimates constitute an admission that cable companies currently enjoy a substantial competitive cost advantage

over their CLEC competitors. These commenters also fail to recognize the benefits of eliminating disputes through greater regulatory certainty and clarity.

8. ILEC commenters allege that the Petitioners' argument for parity should extend—and can extend—to ILEC attachments on electric utility poles. They are wrong. The Commission has no statutory authority to regulate ILEC attachment rates and, lack of statutory authority aside, the policy reasons for excluding ILEC attachments from Federal pole attachment regulation remain valid.

I. The issue raised in the Petition is appropriately a matter of declaratory ruling, not rulemaking.

Opposing commenters largely ignore the central issue raised in the Petition: the applicability of the statutory Telecom Rate to VoIP attachments pursuant to the nondiscrimination mandate of section 224(e). Instead, they call for radical changes to the Commission's existing pole attachment rate regulations that would exceed the Commission's statutory authority and waste the Commission's time and resources through a protracted rulemaking process.

A. The Petitioners seek only a declaratory ruling on a point of law that is entirely consistent with the statutory mandate of nondiscrimination.

Several commenters suggest that the Petition somehow "seek[s] to upend the Commission's orderly rulemaking process"[6] and that the issues raised in the Petition should be addressed in the "ongoing" pole attachment NPRM proceeding.[7] Instead of simply clarifying existing law, these commenters would have the Commission go even further and adopt a new

[6] VoIP Petition Proceeding, Comments of Time Warner Cable at 5 (filed September 24, 2009) ("TWC Comments").

[7] VoIP Petition Proceeding, Comments of the United States Telecomm Association at 4 (filed September 24, 2009) ("USTA Comments"); *see also,* VoIP Petition Proceeding, Comments of the Independent Telephone & Telecommunications Alliance at 2 (filed September 24, 2009) ("ITTA Comments") and VoIP Petition Proceeding, Comments of tw telecom, inc. at 4 (filed September 24, 2009) ("TWTC Comments").

"broadband" rate beyond the existing statutory framework, which would then be extended to attachments that are not even subject to the Commission's pole attachment jurisdiction.[8]

These commenters are wrong. The Petitioners have no intention—or ability—to "upend" the Commission's regulatory processes. Also, the record established in the NPRM proceeding crisply delineates the legal boundaries of the Commission's authority, showing that the Commission has no power either to set aside the Telecom Rate formula or to regulate ILEC attachments on electric utility poles.[9]

Given these limitations on the Commission's legal authority, the simplest path to regulatory parity is to grant the requested declaratory ruling. No modification of the Commission's regulations is required to make the requested clarification.[10] In particular, the Commission need not, and should not, consolidate this technical legal issue with broader pole attachment regulatory matters in the context of the pending pole attachment NPRM or any future pole attachment rulemaking. The Commission's regulations already state that the telecommunications rate applies to any "cable operator providing telecommunications

---

[8] Attachments by competitive local exchange carriers ("CLECs") are already covered by the Telecom Rate and incumbent local exchange carriers ("ILECs") are excluded from the definition of "telecommunications carrier" in section 224 of the Communications Act (47 U.S.C. § 224(a)(5)). Accordingly, ILEC attachments on electric poles are not subject to the Commission's pole attachment jurisdiction.

[9] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 (hereinafter, "Pole Attachment NPRM Proceeding"), RM Docket Nos. 11293, 11303, Comments of the Edison Electric Institute and Utilities Telecom Council at 116 (filed March 7, 2008) ("EEI/UTC NPRM Comments") (stating that "ILECs … are not entitled to regulated pole attachment rates, terms and conditions…."); Pole Attachment NPRM Proceeding Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachments at 3 (filed March 7, 2008) ("FP&L and TEP NPRM Comments") (stating that "[t]he Commission cannot, under the plain text of Section 224, exercise jurisdiction over ILEC attachments on electric utility poles"); Pole Attachment NPRM Proceeding, Comments of Time Warner Cable at 47 (filed March 7, 2008) (stating that "the Commission lacks any statutory authority to regulate the pole attachment rates imposed on incumbent LEC pole owners"); Pole Attachment NPRM Proceeding, RM Docket Nos. 11293, 11303, Comments of Comcast Corporation at 48 (filed March 7, 2008) ("Comcast NPRM Comments") (stating that "[t]he Pole Attachment Act clearly and unambiguously excludes ILECs from its protections").

[10] Should the Commission see fit to undertake a pole attachment rulemaking within the context of the National Broadband Plan, the Electric Utilities would welcome changes to the implementation of the Telecom Rate and establishment of sufficiently deterrent penalties for unsafe and unauthorized attachments by cable operators and CLECs.

services"[11] and that "cable operators must notify pole owners upon offering telecommunications services."[12] The Commission has only to clarify that, for purposes of its pole attachment regulations, providing "telecommunications services" includes providing interconnected VoIP. The requested ruling is a step the Commission can take—and must take—expeditiously, without revising its pole attachment regulations or resolving the broader issues surrounding the classification of VoIP.

B. The requested ruling would not result in impermissible "retroactive ratemaking."

The company named "tw telecom" (hereinafter "TW Telecom") contends that the request ruling in this matter would lead to impermissible "retroactive ratemaking."[13] TW Telecom's argument wrongly presumes that the Cable Rate is already the default rate for commingled cable and VoIP attachments. As explained in the Petition and in the Electric Utilities' supporting comments, the cable rate is not the "default" rate for cable attachments used for VoIP. Further, retroactive ratemaking involves changing an existing rate. The Petition does not seek a change in how the applicable rate is calculated; rather, the Petition seeks only clarification that the applicable rate to use is, as a matter of law, the Telecom Rate. Where there is no effective rate in place, there is no bar to "retroactive" clarification of the applicable rate.[14]

---

[11] 47 C.F.R. § 1.1409(e)(2).

[12] *Id.* at § 1.1403(e).

[13] TWTC Comments at 4-5.

[14] TW Telecom's concern regarding an adjudication possibly requiring retroactive application of the rate change is unfounded. TWTC Comments at 5. As TW Telecom has indicated, the Commission can, and has decided, such questions in other adjudicatory proceedings and found that retroactivity of the applicable rate would be determined on a case-by-case basis. *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, at para. 23 (2004) (finding that AT&T's specific VoIP service at issue in the proceeding was a telecommunication service and thus access charges were applicable to it; also holding that a determination of whether those charges can be collected retroactively must be "addressed on a case-by-case basis").

II. Opposing commenters virtually ignore the central legal issue in the Petition: the nondiscrimination mandate of section 224(e) requires that the Telecom Rate applies to jurisdictional attachments used for VoIP.

Several opposing commenters agree with the Petitioners that there should be parity in pole attachment rates for Cable and CLECs; however, their proposed solution is to apply the historic Cable Rate to all jurisdictional broadband attachments.[15] TW Telecom turns the Petition's nondiscrimination argument on its head, arguing that 224(e)(1) nondiscrimination mandate is severable from the Telecom Formula in the same subsection and that, therefore, the FCC should apply the Cable Rate to CLECs also. Charter boldly argues that the statutorily mandated Telecom Rate is simply not "appropriate" because the number of attachers per pole is lower than some parties may have anticipated when the 1996 Act became law.[16]

The opposing commenters are wrong. As the Petition clearly explains, section 224(e) provides for a rate formula (subsequently referred to as the "Telecom Rate") for pole attachments made by "providers of telecommunications services."[17] The same subsection (e) provides that the Commission must "ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments."[18] "Pole attachment," in turn, is defined as "any attachment" by a cable system or provider of telecommunications services.[19] In this context, "nondiscriminatory" means "the same rate"—i.e., the same as the Telecom Rate. Thus, where no other rate is expressly provided by the statute, the Telecom Rate is the applicable, nondiscriminatory rate.[20]

---

[15] *See, e.g.*, VoIP Petition Proceeding,, Comments of Comcast Corporation at 23 (filed September 24, 2009) ("Comcast Comments").

[16] VoIP Petition Proceeding, Comments of Charter Communications, Inc. at 14-15 (filed September 24, 2009) ("Charter Comments").

[17] VOIP Petition at 17-22.

[18] 47 U.S.C. § 224(e) (emphasis added).

[19] *Id.*

[20] Section 224(e) expressly requires that the Telecom Rate apply to all attachments used by telecommunications carriers to provide telecommunications services, i.e., CLECs. Thus, logically, if the Telecom

The use of the term "nondiscriminatory" plainly and inarguably establishes a very stringent standard. The statute does not say "not unduly discriminatory,"[21] "unjust and unreasonable discrimination,"[22] or the like. There is no "wiggle room." In the context of rates for a service, discriminatory pricing simply means charging two different rates to two different customers where there is no difference in the cost to provide the service. As the Commission has stated in the context of section 251(d)(1) regarding interconnection rates, the "economic definition of price discrimination" is "the practice of selling the same product at two or more prices where the price differences do not reflect cost differences . . . ."[23]

As a result of this stringent statutory standard, to avoid rate discrimination, the Commission must use the same rate for CLECs and all other "pole attachments" (i.e., all attachments subject to its jurisdiction).[24] The only possible exception to the nondiscrimination

---

Rate applies to one category of attachers (i.e., CLECs), but no rate is specified for another category of attachers (e.g., cable system attachments used to provide commingled cable and VoIP), then the nondiscriminatory (i.e., same) rate for both categories must be the Telecom Rate.

[21] 16 U.S.C. § 824e(a) ("Whenever the Commission … shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate").

[22] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order para. 217, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (1996) ("Local Competition Order") (finding that "Section 202(a) of the Act states that '[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services for or in connection with like communication service . . . by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person.' By comparison, section 251(c)(2) creates a duty for incumbent LECs 'to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.' The nondiscrimination requirement in section 251(c)(2) is not qualified by the 'unjust or unreasonable' language of section 202(a). We therefore conclude that Congress did not intend that the term 'nondiscriminatory' in the 1996 Act be synonymous with 'unjust and unreasonable discrimination' used in the 1934 Act, but rather, intended a more stringent standard.").

[23] Local Competition Order at para. 860, citing David L. Kaserman & John W. Mayo, Government & Business: *The Economics of Antitrust & Regulation* at 273-74 (1995) (emphasis added).

[24] Local Competition Order at 859 (stating that "[w]e conclude that the term 'nondiscriminatory' in the 1996 Act is not synonymous with 'unjust and unreasonable discrimination' in section 202(a), but rather is a more stringent standard. Finding otherwise would fail to give meaning to Congress's decision to use different language").

rule for jurisdictional attachments is where the statute expressly carves out a different rate for a specific category of pole attachments, as in the case of the section 224(d) rate for attachments used "solely to provide cable service."[25] The statute makes no separate provision for attachments used for cable service commingled with VoIP. Accordingly, the only permissible, nondiscriminatory rate possible for cable VoIP attachments under the statute is the Telecom Rate. The Commission must act swiftly to clarify this matter.

The Electric Utilities agree with TW Telecom that the "nondiscriminatory" requirement of 224(e) means that the same rate must apply to all pole attachments. However, TW Telecom argues that the nondiscrimination language of 224(e)(1) is severable from the language of 224(e)(2) and (3) providing for cost allocation under the Telecom Formula.[26] In essence, TW Telecom argues that "[w]here the cost allocation guidelines yield discriminatory rates, the nondiscriminatory mandate must trump Section 224(e)(2) and (3)."[27] In other words, Congress might as well have left out (e)(2) and (3). Apart from being directly contrary to the plain text of 224(e), TW Telecom's argument ignores that the courts have on every occasion upheld the Telecom Rate—which is nothing other than the cost allocation language of 224(e)(2) and (3) expressed as a formula—as a just and reasonable rate.[28]

---

[25] 47 U.S.C. § 224(d) (emphasis added). As explained in part IV below, the Supreme Court in *Nat'l Cable and Telecomm. Ass'n v. Gulf Power Co*., held that the Commission has authority to regulate cable attachments used for commingled cable and internet service. Although the Commission in that case applied the Cable Rate to such attachments, the issue of whether the Commission chose the correct rate was not before the court. *See, Nat'l Cable and Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) ("*NCTA v. Gulf Power*") (stating that "the rate the FCC has chosen [is] a question not now before us").

[26] TWTC Comments at 4.

[27] *Id.* at 4, citing *White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecommunications Services* at 14, RM-11293, RM-11303 (filed Jan. 16, 2007).

[28] See *Alabama Power v. FCC*, 311 F.3d at 1371 n23, *citing In the Matter of Ala. Cable Telecomm. Ass'n*, 16 FCC Rcd. 12,209, ¶ 49 ("The FCC reached a perfectly logical conclusion when it observed: 'Congress' decision to choose a slightly different methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula . . . because both formulas provide just compensation under the Fifth Amendment . . . . Congress used its legislative discretion in determining that cable

III. The opposing commenters' proposal for re-regulation by "forbearance" is contrary to law and out of touch with the Commission's current efforts to clarify the forbearance process.

Several commenters argue that the Commission can achieve rate parity between cable operators and CLECs by "forbearing" from applying the Telecom Rate, thereby making providers of telecommunications services eligible for the Cable Rate.[29] They are wrong.

A. Section 10 does not authorize "re-regulation by forbearance."

Congress enacted section 10 to authorize the Commission to advance the policy goals of the Act by deregulation, not re-regulation.[30] As the Commission recently noted in its Forbearance Procedures Order, "Congress found that 'to improve the [1996 Act's] deregulatory nature,' it had to give carriers the ability to compel the Commission to exercise its authority 'to forbear from regulating.'"[31]

Section 10 of the Communications Act directs the Commission to "*forbear from* applying any regulation or any provision" of the Communications Act upon a determination that

---

and telecommunications attachers should pay different rates."); *Georgia Power v. Teleport Comm. Atlanta*, 346 F.3d 1033 at 1047 (11th Cir. 2003) (holding that the Telecom Rate provides just compensation).

[29] See Comcast Comments at 30, Charter Comments at 16 and *Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154, Comments of the National Cable and Telecommunications Association at 19-21 (filed September 24, 2009) ("NCTA Comments").

[30] *See, e.g.*, *In the Matter of Petition to Establish Procedural requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Statement of Commissioner McDowell, FCC 09-56 (2009) (stating that "the purpose of this Order is not to make it harder for petitioners to receive the benefits of deregulation through forbearance. For instance, our Order does not raise or lower the evidentiary bar that any other petitioner has faced in a Section 10 proceeding before this Commission. Instead, today's action will help the Commission to manage its resources, and to ensure the forbearance process is more efficient, predictable, fair, and transparent for all parties concerned. It is a constructive step down the road to greater reform of the Commission and its processes.").

[31] *In the Matter of Petition to Establish Procedural requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order at para. 5, FCC 09-56 (2009) ("Forbearance Order"), citing, 141 Cong. Rec. S8069-70 (June 9, 1995) (remarks of Sen. Pressler).

"*enforcement* of such regulation or provision" is not necessary to meet specified standards.[32] Significantly, a petition for forbearance asks the Commission to forebear from enforcing a regulation or provision "with respect to that carrier or those carriers."[33] In other words the Commission is requested to forbear from enforcing such requirement against the petitioner, not to forbear from enforcing it against a third party.[34] In the case of a regulated pole attachment rate charged by a utility pole owner, if the Commission were to forbear from enforcing the cost allocation (i.e., Telecom Rate) language of section 224(e), the result would be that the Commission would no longer enforce section 224(e) against utility pole owners. Section 224 authorizes pole attachers to file complaints regarding rates charged by pole owners. The Commission *enforces* the rate provisions of section 224 *against utility pole owners* by hearing complaints filed by pole attachers against utility pole owners and issuing orders directing such utilities to modify their rates. Consequently, if section 224(e) were no longer enforced, ILECs and electric utilities would be free to charge market-based rates for pole attachments used to provide telecommunications services.

Similarly, in the case of Commission-initiated forbearance, the objective of Section 10 is to allow de-regulation, not the substitution of one set of regulations for another. To the extent Section 10 gives the Commission any authority to take "affirmative acts," such acts must be deregulatory in nature. For example, in *MCI Worldcom, Inc. v. FCC*,[35] the DC Circuit upheld

---

[32] 47 U.S.C. § 160(a) (emphasis added). See also 47 U.S.C. § 160(b) (directing the Commission to consider whether "forbearance from *enforcing*" the provision or regulation will promote competition) (emphasis added).

[33] *Id* at § 160(c).

[34] Forbearance Order at para. 20 (stating that "the essential nature of a petition for forbearance is that it is a petition for relief from regulation. The petitioner asks the Commission to forbear from enforcing against it one or more rules or statutory provisions, which the Commission will do if it determines that the petition meets the statutory criteria.").

[35] *MCI Worldcom, Inc. v. FCC* , 209 F.3d 760 (DC Cir. 2000).

the Commission's use of its forbearance authority in its mandatory detariffing order for interexchange services by non-dominant carriers, which not only eliminated enforcement of tariffing requirements under section 203(a), but also required "barring the doors of the FCC to lawyers bearing tariff filings and throwing out extant tariffs."[36] In that case, the Commission did not "detariff" in order to subject the regulated parties to a different tariff. Rather, the point of the order was to eliminate all section 203(a) rate filings.

Clearly, neither the cable commenters nor the Petitioners are asking the Commission to forbear from enforcing the Telecom Rate against pole-owner ILECs and electric utilities. Likewise, they are not requesting to bar the Commission's door to cable operator filings in the context of complaint proceedings.[37] Instead, what the opposing commenters appear to be arguing is that the Commission can, under the guise of Section 10 forbearance, suppress the implementing regulations under one provision so as to impose a different set of regulations that are contrary to that provision. This proposed course of action is neither "forbearance from enforcement" nor "deregulation by forbearance." Instead, it is impermissible "re-regulation by forbearance."

B. The opposing commenters' call for "forbearance" contradicts the Commission's efforts to establish reasonable parameters for the forbearance process.

The opposing commenters' urge the Commission to take an expansive view of its forbearance powers in a novel setting: taking away one set of regulations so that another set of regulations favored by a special interest will take effect by default. This proposal is completely out of touch with the Commission's recent efforts to bring greater transparency, predictability, and order to its regulatory processes, particularly in the case of forbearance. The Commission's

[36] *Id.*

[37] 47 C.F.R. § 1.1404(g).

Forbearance Procedures Order of June 2009 establishes clear and precise requirements for the filing of forbearance petitions, including requirements that the petitioner specify the "scope of relief" the petitioner is seeking from a regulation or provision applicable to the petitioner.[38] Commissioner Copps hailed the order as a remedy for the "the ills of a forbearance process gone awry" and emphasized that the order was "in spirit with the limited purposes for which [the forbearance provision] was designed."[39] Using the Commissions' limited forbearance power to "re-regulate" cable pole attachments would go far beyond the "spirit" and limited purposes of the provision.

C. Cable commenters' resort to a plea for forbearance constitutes an admission that section 224(e) requires the application of the Telecom Rate to VoIP.

In any event, the commenters' suggestion that the Commission should take the extreme step of suppressing cherry-picked portions of section 224(e) constitutes an admission on their part that 224(e) does require that VoIP attachments be subject to the Telecom Rate. Since section 224(e) requires that rates for pole attachments be nondiscriminatory, and that the Telecom Rate apply to attachments used by telecommunications carriers to provide telecommunications services, the only logical conclusion is that every pole attachment used to provide VoIP service must be subject to the Telecom Rate. If the law were otherwise, there would be no need for the cable commenters to urge the Commission to "forbear" from complying with the plain text of section 224(e).

---

[38] Forbearance Order at para. 19.

[39] *In the Matter of Petition to Establish Procedural requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Statement of Commissioner Copps, FCC 09-56 (2009) (stating that "changes are good for numerous reasons not the least of which is that they establish reasonable parameters for the forbearance process, promote sounder policy-making, and hopefully provide significant savings of human and financial resources for the Commission, which has expended far too many dollars and hours dealing with matters that should have been dealt with elsewhere or, occasionally, not at all.").

IV. The Cable Industry's argument that the Federal Courts have "upheld" the Cable Rate is irrelevant to the issue of nondiscrimination under section 224(e).

The cable commenters seem to suggest that the Cable Rate is inviolable because it has "on every occasion" been "upheld" as just and reasonable by the Federal Courts. They are wrong. The legal issue raised in the petition is the issue of discrimination. Whether the Federal Courts have upheld the Cable Rate as a just and reasonable rate does not control this legal determination.

A. The Courts have never held that the cable attachments used to provide commingled services are entitled to the Cable Rate in contravention of the nondiscrimination mandate of section 224(e).

The cable commenters insist that it is "long-settled" that the Cable Rate is just and reasonable.[40] Even if true, the question of whether the Cable Rate provides just and reasonable compensation is irrelevant to the issue of nondiscrimination under section 224(e) and constitutes a "red herring." In support of this red herring, NCTA offers a seemingly impressive Federal Court case list that, upon examination, is irrelevant to the issue of discrimination. Not one of the cases cited addresses, or even discusses, the nondiscrimination mandate of section 224(e). In short, the supposed constitutional sufficiency of the Cable Rate does not control or limit the meaning of the term "nondiscriminatory" with regard to applying the Telecom Rate to commingled cable and VoIP attachments.

No Federal Court has held or otherwise "found" that cable systems are statutorily or constitutionally *entitled* to the Cable Rate for attachments used for comingled services. NCTA supplies, as Appendix A to its comments, "Examples of FCC, State and Court Decisions Addressing Reasonableness of Cable Pole Attachment Rates." In only two of the six cases NCTA cites, did the courts find that the Cable Rate may be constitutionally sufficient under

[40] NCTA Comments at 5.

certain circumstances, but, importantly, they did not hold or otherwise find that the Cable Rate is the *only* constitutionally permissible rate or that the constitutional sufficiency of the Cable Rate somehow overrides the nondiscrimination mandate of section 224(e). The remaining cases on NCTA's list simply do not take up the issue of whether the Cable Rate is the correct rate. One of the cases NCTA cites as "Addressing Reasonableness of Cable Rate"—*Southern Company Services v. FCC—does not address the Cable Rate at all*![41] Because NCTA, Comcast and others use these cases so freely to distract from the legal matter at hand in the Petition, the Electric Utilities clarify below the actual matters dealt with and the decisions rendered in each case.

Supreme Court

NCTA v. Gulf Power. The case most frequently cited in support of applying the Cable Rate to commingled cable and VoIP is *NCTA v. Gulf Power*.[42] NCTA seems to give this case a far broader significance than the actual holding in the case warrants. In *Gulf Power*, the Supreme Court addresses the narrow question of whether the Commission has *jurisdiction* over attachments used for commingled cable and internet service. The Court holds that pole attachments used for commingled cable and internet services are subject to Commission regulation under section 224. The Court does *not* decide the issue of whether the Cable Rate was the correct rate for commingled services: "In this suit . . . we address only whether pole attachments that carry commingled services are subject to FCC regulation at all," not "the rate the FCC has chosen, a question not now before us."[43]

[41] The only mention of anything related to the Cable Rate is the Court's synopsis, in the opinion's "Background" section, of the rate provisions of the original Pole Attachments Act of 1978. *See Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002).

[42] *Nat'l Cable and Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) ("*NCTA v. Gulf Power*").

[43] *Id.* at 338.

FCC v. Florida Power. NCTA asserts that the Supreme Court "confirmed the legality of the cable rate formula over 20 years ago in the *Florida Power* case . . . ."[44] However, this case is inapplicable to the nondiscrimination issue raised in the Petition, and does not find that the Cable Rate is a constitutional or statutory entitlement. In this case, the issue of confiscation was not even before the Court.[45] Instead, the Court addressed a procedural issue relating to whether the proper forum for determining just compensation under the Takings Clause is the Commission or the Courts.[46]

Courts of Appeals

Alabama Power v. FCC. The Eleventh Circuit revisited the constitutional question raised in *Florida Power* much later in the case of *Alabama Power*.[47] In *Alabama Power*, the Court found that—in the case of nonrivalrous poles only—the cable rate can provide "just compensation" for purposes of the narrow constitutional takings issue.[48] However, here again, the Court does not address the issue of rate discrimination and does not hold or in any way suggest that the Cable Rate is a constitutional entitlement. On the contrary, the court notes that

[44] NCTA Comments at 5.

[45] *FCC v. Florida Power Corp.*, 480 U.S. 245, 255 (1987), (stating that "Appellees [i.e., Florida Power et al] have not contended . . . that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory").

[46] In *Florida Power*, the issue before the court was about the process for determining whether the Cable Rate results in a taking. The Court overturned the Eleventh Circuit's judgment that the Pole Attachments Act was unconstitutional because it allowed the Commission, rather than the courts, to determine whether the Cable Rate provided just compensation for a taking. The Eleventh Circuit had decided that, under *Loretto*, the Pole Attachments Act resulted in a *per se* taking, requiring just compensation as determined by the courts. In its decision, the Court rejected this reasoning, explaining that nothing in the Pole Attachments Act (in 1987 when *Florida Power* was decided) "gives cable companies any right to occupy space on utility poles . . . ." *Id.* at 251. In citing to this case over twenty years later, Comcast neglects to point out that the Pole Attachments Act was amended by the 1996 Act to do precisely that: to provide a right of cable systems to attach to utility poles.

[47] *Alabama Power Company v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 124 S.Ct. 50 (2003).

[48] *Id.* at 1370-1371.

the Telecom Rate is also constitutionally sufficient: "both [the cable and telecommunications] formulas provide just compensation under the Fifth Amendment."[49]

Southern Company Services v. FCC.[50] *Southern Company Services* does not discuss the Cable Rate at all and, instead, upholds the Commission's implementation of the Telecom Rate. With the case focused on technical and implementation issues, the Court nowhere mentions discrimination, constitutional issues, or anything relating to the reasonableness of the Cable Rate.[51]

Texas Utilities Electric Co. v. FCC.[52] Once again, the question in Texas Utilities is not whether the Cable Rate is discriminatory. Nor does the case hold or otherwise suggest that the Cable Rate is constitutionally or statutorily mandatory for commingled attachments.[53] The Court simply does not address discrimination or the "reasonableness" of the Cable Rate but focuses instead on jurisdictional and procedural issues.

Monongahela Power v. FCC.[54] Here again, neither the question of discrimination nor the reasonableness of the Cable Rate formula is at issue in the case.[55] The Court's opinion upheld

---

[49] *Id.* at 1371.

[50] *Southern Co. v. FCC*, 293 F.3d 1338, 1341-42 (11th Cir. 2002).

[51] Specifically, the case addresses four sets of issues: (1) the number of attaching entities for purposes of implementing the Telecom Rate; (2) the "sign-and-sue" rule relating to executed pole attachment agreements; (3) overlashing issues; and (4) space occupied by conduit attachments. *Southern Co. v. FCC*, 293 F.3d 1338, 1342 (11th Cir. 2002). The only thing remotely related to the Cable Rate is a brief summary of the provisions of the original Pole Attachments Act in the "Background" section of the opinion. *Id.*

[52] *Texas Util. Elec. Co. v FCC*, 997 F.2d 925 (D.C. Cir 1993).

[53] Instead, the court addressed two issues: (1) the jurisdictional question of whether the Commission could regulate cable system pole attachment rates at all, where the attachments are used to carry non-video communications; and (2) the procedural question of whether the Commission erred by failing to conduct an evidentiary proceeding to determine a just and reasonable rate where both coaxial and fiber optic cables are attached to a pole. *Texas Util. Elec. Co. v FCC*, 997 F.2d 925 at 935 (D.C. Cir 1993).

[54] *Monongahela Power v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).

[55] In *Monongahela*, the petitioner utilities challenged the Commission's pole attachment regulations on three points relating to the amount of usable space occupied by a cable attachment, the calculation of capital costs, and the prospective application of rate regulations to existing contracts. *Monongahela Power v. FCC*, 655 F.2d 1254, 1255 (D.C. Cir. 1981).

the Commission's determinations only on the grounds of discretion under the statutory language at issue on questions involving usable space, capital costs, and existing contracts. The Court addresses no constitutional issues[56] and nowhere mentions discrimination.

B. The Telecom Rate has been found to be just and reasonable.

Any suggestion that the Cable Rate is somehow the only constitutionally or statutorily permissible pole attachment rate is simply false, because the Courts on every occasion have also confirmed that the higher Telecom Rate is just and reasonable. For example, in *Alabama Power Company v. FCC*,[57] the Court acknowledged that "the Telecom Rate provided in 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments."[58] The Court then stated:

> The FCC reached a perfectly logical conclusion when it observed: "Congress' decision to choose a slightly different methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula . . . because both formulas provide just compensation under the Fifth Amendment . . . . Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates."[59]

Furthermore, in *Georgia Power v. Teleport*, the Court held that the Telecom Rate provides just compensation.[60] The Court also recognized that, under the Telecom Rate, "rent can be assessed for the unusable space on a utility pole (essentially the part of the pole near the ground where no

[56] With regard to the contract issue in particular, the Court notes that "Intervenors recognize the issue is one of statutory interpretation, and raise no constitutional argument." *Monongahela Power v. FCC*, 655 F.2d 1254, 1256 (D.C. Cir. 1981). The Court otherwise makes no mention of constitutional issues. *Id.*

[57] *Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002).

[58] *Id.* at 1371, fn. 23.

[59] *Id.*, *citing In the Matter of Ala. Cable Telecomm. Ass'n*, 16 FCC Rcd. 12,209, ¶ 49.

[60] *Georgia Power v. Teleport Comm. Atlanta*, 346 F.3d 1033 at 1047 (11th Cir. 2003).

attachments can be placed) but which is nonetheless necessary to support the remainder of the pole, where attachments can be placed."[61]

V. The Cable Rate is a subsidy rate as a matter of law, notwithstanding the Cable Industry's misleading argument that the Federal Courts have "upheld" the Cable Rate as constitutionally sufficient.

The legal issue raised in the Petition is the issue of nondiscrimination under section 224(e). Whether or not the Cable Rate provides a subsidy to cable operators does not control the legal issue of nondiscrimination. Instead of addressing the legal issue of discrimination, the cable commenters seek to distract the Commission's attention with a string of Federal Court cases that supposedly show that the Cable Rate is not a subsidy rate. Their caselaw argument is not only irrelevant, but also wrong.

A. Constitutionally sufficient does not mean subsidy-free.

To show that a rate is just and reasonable, and therefore non-confiscatory for purposes of a constitutional takings analysis, it is sufficient to show that the rate falls within a "zone of reasonableness." To show that a rate does not result in a subsidy an entirely different matter.

The cable commenters argue that, because the Courts have found that the Cable Rate is constitutionally sufficient, it is therefore not a subsidy rate. In support of this claim, NCTA simply provides a list of six Federal Court decisions in which the Cable Rate has supposedly been "upheld" as providing sufficient compensation to pole owners.[62]

The cable commenters are wrong. None of the Court cases cited discuss the issue of subsidies, or even mention the term "subsidy." (As stated above, one of these cases—*Southern*

[61] *Id.* at 1037.

[62] NCTA Comments at Appendix A - Examples of FCC, State and Court Decisions Addressing Reasonableness of Cable Pole Attachment Rates.

Company Services—does not even address the Cable Rate.) The cable commenters are trying to equate subsidy with constitutionally confiscatory.

However, even if one assumes that a rate is non-confiscatory for purposes of a Fifth Amendment takings, it does not follow that the rate is not a subsidy rate. A subsidy is not the same as confiscation. Black's Law dictionary defines "subsidy" as "[a] grant, usu. made by the government, to any enterprise whose promotion is considered to be in the public interest. Although governments sometimes make direct payments (such as cash grants), subsidies are usu. indirect."[63] A favorable regulated rate is an example of an indirect, government-mandated subsidy. In other words, a subsidy is an advantage gained by an entity as a result of a government action to "promote" a particular activity by that entity. By contrast, the legal test for a taking is not what the taker has gained, but what the owner has lost.[64]

B. The text, structure and legislative history of section 224 show that the Cable Rate is a subsidy rate.

The text and structure of section 224 shows that, of the two statutory rates provided in the Pole Attachments Act, the lower Cable Rate is a subsidy rate, i.e., a rate intended to "promote" the cable television enterprise by providing a "more favorable rate" than cable operators would otherwise receive.[65] Because it does not divide the cost of the common space equally among all attachers, the Cable Rate is inherently a subsidy formula that does not achieve a full allocation of the costs properly allocable to cable attachers. Instead, a cable attacher pays only a disproportionately small fraction of the entire cost of the pole, based only on the percentage of

---

[63] BLACK'S LAW DICTIONARY 1196 (8th ed. 2004).

[64] In takings law, "the legal principle is that . . . just compensation is determined by the loss to the person whose property is taken. . . . Put differently, 'the question is, What has the owner lost? not, What has the taker gained?'" *Alabama Power v. FCC*, 311 F.3d at 1369, quoting *United States v. Causby*, 328 U.S. 256 (1946).

[65] Whether or not the Telecom Rate is also a subsidy rate is not an issue raised by the Petition. By not raising this issue in the Petition, the Electric Utilities in no way relinquish their right to do so at a future date or in other proceedings or forums.

usable space it occupies. This approach disregards the fact that the cable attacher, like all other users of the pole, needs the common space to have any ground clearance and certainly to maintain sufficient ground clearance as is required by applicable safety codes such as the NESC. Without the common space, there is, in effect, no "pole."

The legislative history leading to the 1996 Act's amendments to section 224 shows that the historic Cable Rate of 1978 was established to subsidize the growth of an "infant" industry and that cable companies were expected to pay the higher Telecom Rate upon becoming competitors in the market for telephone services. In the course of considering legislation to establish the higher Telecom Rate, the House committee acknowledged that the Cable Rate was "established to spur the growth of the cable industry, *which in 1978 was in its infancy*."[66] Referring to the original Cable Rate, a House Report states: "The formula, developed in 1978, gives cable companies a more favorable rate for attachment than other telecommunications service providers."[67]

Furthermore, the Conference Report shows that the Telecom Rate was intended to correct the inequity of the Cable Rate by allocating the common space on the pole more equitably among all attachers:

> The new [Telecom Rate formula] provision directs the Commission to regulate pole attachment rates based on a 'fully allocated cost' formula. In prescribing pole attachment rates, the Commission shall: (1) recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments; (2) recognize that the usable space is of proportional benefit to all entities attaching to the pole … and therefore apportion the cost of the usable space according to the percentage

[66] Committee on Commerce Report to Accompany H.R. 1555, the Communications Act of 1995, H. Rpt. 104-204 at 91 (1995) (emphasis added).

[67] *Id.*

> of usable space required for each entity; and (3) allow for reasonable terms and conditions relating to health, safety, and the provision of reliable utility service.[68]

Also, in a 1994, hearing on S.1822, the Communications Act of 1994, Chairman Hollings of the Committee on Science, Commerce, and Transportation repeatedly refers to the Cable Rate as a subsidy or discounted rate. For example, "They have a subsidized attachment to your poles…" [69] Referring to *Texas Util. Elec. Co. v FCC*,[70] Chairman Hollings also stated: "A recent court decision … permits cable companies to use the poles, conduits, and rights of way to provide telecommunications services as well as cable service. The court decision raises several questions. Should cable companies continue to be able to receive the same discounted rate for their noncable services?"[71]

Moreover, the legislative history of the 1978 Pole Attachments Act itself shows that both the Commission and the jurisdictional committees were concerned about the potential subsidy effect of the Cable Rate and, accordingly, intended that the statutory Cable Rate formula be adopted only on an interim basis. A 1977 Report of the Senate Committee on Commerce, Science, and Transportation shows that Congress expected the Cable Rate to be only an interim rate to promote the "growth" of cable television: "This interim [Cable Rate] formula reflects a belief that the annual pole attachment fee should be set somewhere between avoidable and fully allocated costs in order to avoid inhibiting the growth of cable television and to insure that cable

[68] Conference Report to accompany S.652, H. Rpt. 104-458 at 206 (1996).

[69] Committee Report on S.1822, the Communications Act of 1994, S.Hrg. 103-599 at 378 ("We will bring them all in on a proportional cost, which will eliminate the subsidy to the cable TV.").

[70] *Texas Util. Elec. Co. v FCC*, 997 F.2d 925 (D.C. Cir 1993).

[71] Committee Report on S.1822, the Communications Act of 1994, S.Hrg. 103-599 at 341.

operators and their subscribers make some equitable contribution to the fixed costs of the utility systems they use."[72]

Furthermore, the Committee insisted that it did not intend to establish a single or permanent "just and reasonable" rate methodology based on "relative use" of pole space:

> In regard to the rate-setting formula set forth in S. 1547, as reported, the Committee wishes to make one point very clear. The particular methodology selected in this bill is only one of many plausible approaches to assigning pole costs to a CATV system, and should not be considered to reflect the Committee's judgment that allocation of pole costs according to relative use is the optimal methodology. The Committee's decision to incorporate a specific rate-setting formula in S. 1547, as reported, is based entirely on the following considerations: to assist the … Commission during the first few years of regulation in this new area; and to provide the Commission with a sense of congressional intent as to the meaning of the term 'just and reasonable rate,' so as to avoid lengthy initial proceedings at the Commission to determine what just and reasonable CATV pole attachment rates should be. The rate-setting formula of S. 1547 … should be regarded as an interim measure only, having no precedential effect whatsoever on other rate-setting responsibilities of the Commission. Nor should this interim formula be deemed to reflect the Committee's preference that the Commission indefinitely employ this particular methodology or the underlying concept of relative use in the instant case of CATV pole attachments.[73]

The Commission itself has also acknowledged that the cable industry was regarded as a fledgling industry in the 1970s. In 1988, the Commission stated what had already become true a mere decade after passage of the 1978 Pole Attachments Act: "Although cable may have seemed a fledgling industry in need of a subsidy to realize its full potential in the 1970s, no one can seriously argue that today's cable industry requires any special subsidy to be competitive…

[72] Senate Report on P.L. 95-234, S. Rep. 95-580, 1978 U.S.C.C.A.N. 109 at 127 (1977).

[73] *Id.* at 128-129.

."[74] That description was in the context of compulsory copyright licenses for cable retransmission, but the parallel with pole attachments is striking. Just as the well-fed cable industry of 1988 no longer needed a subsidy in the form of compulsory copyright licenses, so today the Cable Giants like Comcast and Charter hardly need a pole attachment rate subsidy.

In 1977, a Federal Communications Commission Staff Report acknowledged that the Cable Rate would come at the expense of electric consumers, and expressed concern that such subsidy could become *unreasonable*. The Staff Report notes that any costs not allocated to cable attachers are borne by utility consumers: "Many cable interests argue that they have no or only limited responsibility for recurring costs (including capital charges), and that these should principally be borne by the owners of the facilities. Ultimately, of course, such costs not incurred by cable systems are passed through to consumers of telephone services and electrical energy."[75] Finally, the Staff Report warns against creating an excessive subsidy at the expense of electric consumers: "[I]t is imperative that a legislated definition of reasonable pole attachment rates afford regulatory commissions enough flexibility to implement rates reflecting fully distributed long term costs of space used where such solutions are deemed appropriate. Indeed, if this is not done, regulation could easily result in rather widespread misallocation of resources, thereby placing the burden of unreasonable subsidy on the consumers of power and telephone service."[76]

---

[74] *In the Matter of Compulsory Copyright License for Cable Retransmission*, Report at para. 90, 18 FCC Rcd. 6711 (1989) (discussing compulsory copyright licenses for cable retransmission).

[75] FCC Staff Report at iii.

[76] *Id.* at 36.

Much more recently, the Commission has asked, not whether the Cable Rate provides a subsidy, but "whether cable operators should *continue* to receive such subsidized pole attachment rates at the expense of electric consumers."[77]

VI. As a matter of sound economics, the Cable Rate is a subsidy rate.

Whether or not the Cable Rate is, in economic terms, a subsidy does not control the legal issue raised under section 224(e). Nevertheless, the cable commenters continue to argue that the Cable Rate is not a subsidy because it provides for full recovery of marginal costs. Specifically, they argue that rates based on "costs" are not subsidies;[78] there is no economic subsidy where marginal cost is paid;[79] and make-ready covers all incremental cost;[80]

The cable commenters' arguments may sound "economic;" however, they are not only irrelevant to the question of discrimination, but they also fail to show that the Cable Rate is subsidy-free.

A. Marginal cost alone is not the measure of a subsidy.

Cable commenters claim that marginal cost should be the measure of a subsidy rate.[81] This claim is false as a matter of sound utility economics and has already been refuted in the record of the pole attachment NPRM proceeding. As EEI and UTC explained in their comments in that proceeding, this claim

> ignores the fundamental principle of utility cost-of-service regulation, which is that a regulated utility is entitled to set rates to recover all operating expenses, including depreciation, plus a fair

[77] Pole Attachment NPRM Proceeding, Notice of Proposed Rulemaking at para. 19, 22 FCC Rcd 20195 (2007) ("Pole Attachment NPRM") (emphasis added).

[78] *See, e.g.*, Comcast Comments at 17-18, NCTA Comments at 12, and VoIP Petition Proceeding, Comments of the American Cable Association at 8 (filed September 24, 2009) ("ACA Comments").

[79] NCTA Comments at 9.

[80] *Id.* at 6.

[81] Comcast Comments at 17.

> rate of return on the value of the asset.[82] Thus, it is inconsistent with this concept to mandate any of a utility's regulated assets or services to be subject to marginal cost pricing or any price mechanism that does not allow full cost recovery (unless there is a higher compensating cost recovery in some other sector of the business), whether this be the use of a pole, the leasing of building space, or the operation of a piece of machinery. Providing certain users with a lower price to use regulated assets or services in order to subsidize them would be equivalent in concept to a regulated utility providing a lower electric rate to certain classes of customers based on marginal cost rather than average cost. The fact that these are "new customers" using existing assets does not change the argument—if all "new" customers were put on a marginal cost rate, then a utility would not be recovering its average cost of service as new assets are eventually added to supplement or replace the existing ones.[83]

B. Make-ready charges are separate from pole attachment rates.

Cable commenters claim that the Cable Rate is more than compensatory because a cable attacher pays all of the marginal costs of its attachments in the form of make-ready charges, and then it must additionally pay a pole rental fee based on a portion of the utility's embedded costs.[84] Here again, as EEI and UTC explained in their comments in the pole attachment NPRM proceeding, this claim is irrelevant:

> It is well established that it is just and reasonable for a utility to charge both a non-recurring make-ready charge for its incremental costs and an annual pole rental fee based on a portion of average capital costs and on-going operation and maintenance costs.[85] Make-ready charges are non-recurring costs associated with

---

[82] *See* Charles Phillips, Jr., *The Regulation of Public Utilities* (1993) at 176 ("The basic standard of rate regulation is the revenue-requirement standard, often referred to as the rate base-rate of return standard. Simply stated, a regulated firm must be permitted to set rates that will both cover operating costs and provide and opportunity to earn a reasonable rate of return on the property devoted to the business"). *Id*. Pole Attachment NPRM Proceeding, Reply Comments of the Edison Electric Institute and Utilities Telecom Council at 35 (filed April 22, 2008) ("EEI/UTC NPRM Reply Comments").

[83] EEI/UTC NPRM Reply Comments at 22-23.

[84] *Id.* at 26.

[85] *See In the Matter of Adoption of Rules for the Regulation of CATV Pole Attachments, CC Docket No. 78-144*, First Report and Order at para. 42 (Aug. 8, 1978) (stating with regard to make-ready costs that "a rate that is comprised of both incremental and fully allocated components is not per se unreasonable or unjust, provided it falls within the circumscription of Section 224(d)(1) and otherwise complies with our rules").

> preparing the pole infrastructure to accommodate the attachment. Such charges are not included in the pole attachment rate base for purposes of calculating the annual pole attachment rate. The utility is not overcompensated for the same costs because the make-ready costs are not included in the pole line capital account used in calculating the annual pole attachment rate.[86]

C. The testimony of Comcast's own economist shows that an economically appropriate pole attachment rate need not be based on marginal cost.

The cable industry's own expert economist has testified that the Telecom Rate, which is significantly higher than the Cable Rate and is not based on marginal cost, is economically sound.[87] Dr. Patricia Kravtin admitted on cross examination in a pole attachment rate case that the "telecom formula reflects economically appropriate cost allocation principles" and that the "telecommunications formula is consistent with cost causation principles."[88] The Telecom Rate formula is not based on marginal cost; rather, it is based on a proportionate allocation of the cost of usable space plus an equal allocation of the cost of common (i.e., "unusable") space.[89] Dr. Kravtin's testimony thus contradicts the cable industry's claim that marginal cost is the appropriate measure for whether a rate is a subsidy rate or otherwise "economically appropriate." Moreover, if the Telecom Rate is economically appropriate, and the Cable Rate is far lower than the Telecom Rate, it follows that the Cable Rate is a government-granted advantage (i.e., subsidy) given to cable companies at the expense of electric consumers and the cable industry's CLEC competitors.

---

[86] *See, e.g., In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Report and Order at para. 27 (March 29, 2000) (stating that "[m]ake-ready costs are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation").

[87] Comcast NPRM Comments at Exhibit 1, Report of Patricia D. Kravtin at 67-68.

[88] Pole Attachment NPRM Proceeding, Reply Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachments at fn. 68 (filed March 7, 2008) ("FP&L and TEP NPRM Reply Comments").

[89] Although the Telecom Rate is not subsidy-free, it provides far less of a subsidy than the Cable Rate. EEI UTC NPRM Comments at 13-14, 43-45.

VII. The alleged impacts on cable consumers and broadband deployment are exaggerated and misleading.

Whether or not adoption of the Telecom Rate for cable VoIP attachments results in increased costs for the cable industry does not control the legal determination raised in this proceeding: whether the Cable Rate is discriminatory as applied to cable attachments used for commingled cable service and VoIP. Nevertheless, the cable commenters argue at length that applying the Telecom Rate to VoIP attachments will result in massive cost increases. These commenters are wrong. NCTA's, Comcast's and Charter's predicted cost increases are based on unrepresentative data and distorted calculations, and, ironically, these figures simultaneously contradict the same commenters' claims that pole attachment rates have an insignificant financial impact on electric consumers.

A. NCTA's and Charter's predicted cost increases are unrepresentative and misleading.

1. NCTA's predicted cost increases are modest compared to the average monthly revenue per customer earned by Cable Giants like Comcast.

Pelcovits claims that this increase will result in an *annual* cost increase of $5.82 to $89.18 per customer.[90] The higher end of the range of estimates—$27.65 to $89.18 per customer—assumes that the cost increase is allocated only to voice customers. Accordingly, on a per month basis, the highest estimated increase for voice customers (assuming no increase for any other customers) is $7.43. The lowest estimated increase would be 48 and a half cents per month. This calculation translates to an estimated monthly increase of somewhere between 48 cents and $7.43. Consider, however, that Comcast's average revenue per customer in FY 2008

[90] NCTA Comments at Appendix B - Declaration of Dr. Michael D. Pelcovits at para. 11.

was $110 per month.[91] Comcast's "triple play" package (video, internet, and voice) yields $120-$130 per customer per month.[92] If the alleged increases are allocated equally among all Comcast customers, the cost increase would only be between less than four percent per month on average.

However, a critical analysis of Pelcovit's data and methodology suggest that his predictions are exaggerated. First, using "publically [sic] available sources" he estimates that the current "weighted average" of pole attachment rates is $5.25. Then he takes that figure and increases it by 25 percent, based on secret sources: "Based on my discussions with cable industry representatives, I understand that the level of pole attachment rates currently being paid is much higher than the estimate I derived from public[ly] available sources. Therefore, for purposes of considering the possible range of outcomes resulting from the FCC's actions, I ran the model using an alternative average current rate of $7.50."[93] This estimate is—according to the cable industry's own figures filed in another recent proceeding—higher than the typical Cable Rate. Comcast, for example, repeatedly uses the figure of $5.96 as a "typical" Cable Rate amount in its comments on the pole attachment NPRM.[94] NCTA's comments in the same proceeding allege "weighted averages" of $3.76 and $5.14 for telephone and electric utilities, respectively, in FCC-regulated States.[95] According to NCTA, the cable rate for electric poles in nine out of 32 FCC-regulated States is between $1.00 (New Mexico) and $4.00 (Arkansas).[96]

---

[91] Comcast Corporation Form 10-K for fiscal year ending December 31, 2008 at 26, available at <http://www.comcast.com/2008annualreview/?INTCMP=ILCCOMCOMAL20943&fss=Annual%20Report> (last accessed October 8, 2009).

[92] Comcast, *Annual Report 2006*, Shareholder Letter at 2, *available at* <http://www.comcast.com/2006ar/letter2.htm> (last accessed October 8, 2009).

[93] NCTA Comments at Appendix B - Declaration of Dr. Michael D. Pelcovits at para. 9.

[94] Comcast NPRM Comments at Exhibit 1, Report of Patricia D. Kravtin at 67-68 (in the context of a case study "which I believe to be typical").

[95] Pole Attachment NPRM Proceeding, Comments of the National Cable and Telecommunications Association at 9 fn. 30 (filed March 7, 2008) ("NCTA NPRM Comments"), citing TWTC Presentation Regarding Pole Attachment NPRM attached to Letter from Thomas Jones, Counsel to Time Warner Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Oct. 23, 2007) (comparing cable rates between

2. Charter's cost impact figures are grossly exaggerated and misleading.

Charter Communications, Inc. ("Charter") boasts that it is "one of the largest broadband providers and *is already the tenth largest telephone service provider in the country*."[97] Yet Charter argues that it should not pay the same pole attachment rate as other telephone service providers. In its comments on the Petition, Charter claims that the requested ruling would result in cost increases of between "$4.95-$8.66 per Internet subscriber per month and $13.27-$23.23 per voice subscriber per month . . . ."[98] These figures are grossly exaggerated because they are calculated on the basis of skewed assumptions that have nothing to do with the requirements of section 224. Significantly, these claims have nothing to do with the legal question at issue in this proceeding: whether the Cable Rate for VoIP violates the nondiscrimination mandate of section 224(e). Nor do these claims address the policy issue of whether the Cable Giants should continue to receive a competitive advantage in the form of a subsidy rate for Cable VoIP relative to Cable's CLEC competitors.

In particular, three "red flags" in Charter arguments show that its cost increase estimates are inflated, misleading, and have nothing to do with either the law or good policy.

$4.57 and $7.10 with telecom rates between $10.41 and $18.21); see also *Id.* at Attachment 2, Table A-3 (filed March 7, 2008).

[96] NCTA NPRM Comments at Attachment 2 Table A-3. Only two States mentioned in NCTA's analysis had rates equal to or higher than Charter's $7.50 amount─Hawaii and New Hampshire. *Id.* However, as of last year, New Hampshire pole attachments are no longer FCC-regulated. The FCC currently regulates pole attachments in 30 States. *See* Federal Communications Commission, *Corrected List of States that Have Certified that they Regulate Pole Attachments*, WC Docket No. 07-245 (March 21, 2008) *available at* <http://www.fcc.gov/eb/Public_Notices/DA-08-653A1.html> (last accessed September 23, 2009).

[97] *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Charter Communications, Inc. Notice of Ex Parte Presentation at Reforming the Universal Service Fund to Ensure Universal Broadband Availability (filed Sept. 16, 2009) (emphasis added).

[98] Charter Comments at 2.

a. Red flag #1: Charter's estimates are, by Charter's own admission, not representative of the cable industry attachments regulated by the Commission.

Charter's "Exhibit A"[99] example is a cable system comprised of its Connecticut affiliates ("Northeastern" and "Western"), whose attachments are regulated by the State of Connecticut—*not by the Federal Communications Commission*.[100] Also, following Pelcovits, Charter uses an unrepresentative figure of $7.50 per pole as its exemplar Cable Rate. As explained above, $7.50 is far higher than publicly available sources suggest.

Furthermore, Charter's assumption of 35 poles per mile is hardly representative of rural areas or even of system-wide averages nationwide. For example, Xcel Energy reports a figure of approximately 23 poles per mile in rural areas. It should also be noted that 35 poles per mile translates to 151 foot spans between poles. In the experience of the Electric Utilities, significantly longer spans—and, therefore, significantly lower numbers of poles per mile—are typical, especially in rural areas. For example, Duke Energy's distribution standards provide for span lengths of between 200 feet and 350 feet (depending on the size the wires used and other factors) for all areas.

b. Red flag #2: Charter's "average" increase figures are not a system-wide average at all.

In producing its "average" increase figures, Charter does not calculate a system-wide average. Rather, Charter separately calculates a rate increase for basic cable, internet, and digital voice subscribers and arbitrarily assigns a much higher share of the alleged aggregate cost

---

[99] Charter Comments at Exhibit A.

[100] See Federal Communications Commission, *Corrected List of States that Have Certified that they Regulate Pole Attachments*, WC Docket No. 07-245 (March 21, 2008) *available at* <http://www.fcc.gov/eb/Public_Notices/DA-08-653A1.html> (last accessed September 23, 2009). Charter does not explain Connecticut's rate methodology, how such methodology is similar to or different from the Commission's methodology, nor why rates in a non-FCC-regulated State are an appropriately representative example. Even if Connecticut were under the Commission's jurisdiction, which it is not, it should be noted that Connecticut is one of the highest-income, highest-cost-of-living areas in the country.

increase to its internet and digital voice subscribers. By emphasizing such artificially inflated increases for its internet and digital voice customers, Charter creates the appearance of a much greater average cost increase than is actually the case across its customer base. Neither the text of section 224 nor the Commission's pole attachment regulations say anything at all about how a cable system should allocate its costs to its customers. If Charter chooses to allocate a larger proportion of a particular cost item to a particular customer class, or to its shareholders, that allocation has nothing to do with the requirements of the Pole Attachments Act. A pole attachment rate is a rate that applies to "any attachment" by a cable system.[101] Where such attachments are used to provide services—such as VoIP—other than providing "solely" cable service, the nondiscrimination requirement of section 224(e) demands that those attachment be subject to the same rate that applies to any CLEC: i.e., the Telecom Rate.

Although Charter does not explain why it would allocate a pole attachment cost increase differently among different customer groups, Charter seems to be suggesting that the pole attachment rate somehow corresponds to the use of an individual pole or attachment to serve directly an individual subscriber. The use of a particular attachment to provide VoIP has nothing to do, however, with whether a particular cable customer in a vicinity of a particular pole is a VoIP subscriber, an internet subscriber, or a basic cable subscriber. All Charter attachments that are used to carry a VoIP signal for the purposes of serving Charter's digital voice customers—wherever they may be along Charter's system—would be subject to the Telecom Rate. Any associated cost increase for Charter could just the same be allocated across its entire customer base—not frontloaded onto its VoIP customers. As the Commission has made clear in the context of "dark fiber," the determination that a cable system's attachment is "used" for a

[101] 47 U.S.C. § 224(a)(4).

particular service turns on whether the signal passes through the attachment, not whether the signal is used for a specific customer of the cable system.[102]

Charter uses figures for its Connecticut companies to illustrate its claims, even though pole attachment rates in Connecticut are regulated by the State, not the Commission. Charter assumes that its current average pole rent (presumably calculated using the Cable Rate formula) of $7.50 per pole will, under the Telecom Rate, increase to $17.10 (assuming three attaching entities) per pole—a cost increase of $9.60 per pole. Charter claims it has 4,321 plant miles, with 35 poles per mile, the product of which (unstated by Charter) is a total of 151,235 poles. Thus, the total cost increase for all poles would equal $1,451,856. Charter also states in its summary table of "Source Data" that it has 101,969 "Basic Subscribers."[103] To determine the total average *annual* cost increase per subscriber, though, we must divide the total aggregate cost increase by the total number of subscribers: $1,451,856 / 101,969 = $14.24 per Charter subscriber *per year*, which translates, in turn, into a monthly impact of $1.19 per month—a far cry from the $4.95 to $23.23 figures Charter continues to emphasize.[104] In other words, even if we accept Charter's underlying (and unrepresentative) source data, their statistical wizardry overstates the average impact by a factor of between 5 and 19 times the true average. The skewing effect of Charter's rejiggering of its own number has nothing to do with the law. Charter's fanciful patchwork of

[102] In fact, the consumer of the service need not be a customer of the cable company at all. *See In the Matter of Marcus Cable Associates, LP v. Texas Utilities Electric Company*, FCC 03-173, Order on Review at paras. 15-16 (Adopted July 15, 2003) (rejecting TU Electric's claim that the Telecom Rate applies only to "attachments for services offered by the attacher itself … and not to attachments that are used to allow third parties to provide services").

[103] It is not clear whether this total of "Basic Subscribers" includes internet and digital voice subscribers. The Electric Utilities assume—in Charter's favor—that this figure includes all Charter subscribers within the Connecticut DPUC system.

[104] Another way to reach the same result is to use Charter's stated system-wide average of customers per mile (23.6), average of poles per mile (35), and cost increase figure of $9.60 per pole annually, calculating a monthly average as follows: ((35 x $9.60) / 23.6) / 12 months = $1.19 per customer per month.

supposed customer rate increases simply does not result from the transition from the historic Cable Rate to the non-discriminatory Telecom Rate.

c. Red flag #3: Charter abuses the rural-urban distinction to maximize the rhetorical impact of its claims.

Charter claims that, within the Connecticut DPUC system, there are only 11.8 "basic subscribers" per mile, as compared to a system-wide average of 23.6 subscribers per mile. First, Charter is apparently not quite clear on what counts as rural for purposes of its calculations, because it uses the entire Connecticut DPUC system as its first example of a "rural" system, stating that most Charter systems "have to deal with the low population density characteristic of rural America. In Connecticut, for example, Charter has only 23 subscribers per average plant mile."[105] Second, Charter claims that it is "more expensive to deliver services (especially broadband and other advanced services) to less densely populated rural areas because there are fewer subscribers overall and fewer subscribers per plant mile from which to recover costs."[106] The record shows that the vast majority of such costs especially for "broadband and other advanced services" are head-end capital equipment and other high-tech gear that has nothing to do with pole attachment rates.[107] Also, if Charter is concerned about a differential impact in rural areas, it should provide its own subsidy at the expense of its urban customers, rather than relying on a government mandated subsidy at the expense of electricity consumers and to the competitive disadvantage of other telephone providers.

---

[105] Pole Attachment NPRM Proceeding, Comments of Charter Communications, Inc. at 3 (filed March 7, 2008).

[106] *Id.*

[107] *See A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the Coalition of Concerned Utilities at Exhibit D, Declaration of Dennis R. Krumblis para. 9 (filed June 8, 2009) (stating that "head-end electronics for broadband cost at a minimum approximately $35,000").

3. The cable industry's cost increase estimates, if taken seriously, prove nothing except that cable companies in fact receive a competitive advantage relative to their CLEC competitors.

The many red flags in NCTA's and Charter's cost prediction comments show that its cost increase figures are, at best, misleading. If for the sake of argument one were to assume that NCTA's and Charter's claims about pole attachment rates were to be taken seriously, there is only one reasonable conclusion that can be drawn: NCTA's and Charter's statements constitute a public admission that cable companies currently enjoy an enormous competitive advantage relative to their CLEC competitors in the amounts stated.

Specifically, for example, if Charter's numbers were taken at face value, the current subsidy equals somewhere between $4.95 to $23.23 per customer per month. On Charter's public internet site, the company claims: "With more than 1.4 million telephone customers, Charter is the 10th largest provider of landline telephone service in the nation."[108] Thus (apart from the pertinent question of whether or not "landline telephone service" should be considered anything other than "telecommunications services"), it is clear from Charter's statements that, with respect to Charter's telephone customers alone, it currently enjoys a subsidy of up to ($23.23 x 1,400,000 =) $35,522,000. In other words, Charter is acknowledging that it has a $35+ million *per month* "head start" relative to its CLEC competitors. Putting aside Charter's conclusory and dubious arithmetic, we absolutely agree with what Charter seems to be freely admitting: that Charter's competitors would benefit greatly from the level playing field that would result if the Commission were to discharge its legal obligation under the Pole Attachments Act to provide for nondiscriminatory rates.

[108] Charter, *About Charter available at* <http://www.charter.com/Visitors/AboutCharter.aspx?NonProductItem=20> (last accessed September 22, 2009).

In any event, Charter's claims regarding alleged cost increases, however distorted, are wholly irrelevant to the central legal issue before the Commission: the need to clarify that the nondiscrimination mandate of section 224(e) requires cable systems to pay the same rate as their CLEC competitors (i.e., the Telecom Rate). As explained above, the courts have on every occasion found that the Telecom Rate is just and reasonable. The only remaining legal issue is discrimination. The Pole Attachments Act makes clear that—*with the sole exception of a cable system whose attachments are used "solely" to provide cable service*—all Commission-jurisdictional pole attachment rates must be at the same level mandated for "providers of telecommunications service" as defined in section 224.

Although the legal issue of discrimination is paramount in this proceeding, it should be emphasized that Charter's claims are likewise irrelevant to the important policy issue involved in this proceeding: cable systems whose attachments are used to provide VoIP should not receive a competitive advantage relative to their competitors who provide traditional telephone service.

B. Cable commenters' cost increase claims contradict their claims that the effects of pole attachment rates on electric consumers are negligible.

NCTA's economist Pelcovits predicts a cost increase of between $208 million and $672 million annually if the Telecom Rate formula is imposed on cable attachments.[109] With these figures on the high side exceeding two thirds of a billion dollars, NCTA and other opposing commenters stretch their credibility by also asserting that the impact of pole attachment rates on electric utilities and their customers is negligible.[110] Two-thirds of a billion dollars annually is quite a significant sum of money, and this financial impact cannot simultaneously be a tremendous burden to cable customers and a negligible one for electric utility customers. In

[109] NCTA Comments at Appendix B - Declaration of Dr. Michael D. Pelcovits at para. 21.

[110] NCTA Comments at 13 (citing the allegedly "negligible impact of pole attachment rates on electric ratepayers").

addition to the discrimination argument that is the matter at hand in the Petition, if the cable industry's numbers are to be believed (and as discussed in the sections above, their data is unrepresentative and their calculations distorted), the Commission surely cannot condone prolonging such a financial benefit at electric ratepayers' expense. In any respect, what is clear is that by making this inherently contradictory assertion, these opposing commenters only expose their willingness to "say anything" in order to shore up their shaky position regarding the supposed impact of moving to the Telecom Rate.

VIII. ILEC attachments are not, and should not be, subject to the Commission's pole attachment jurisdiction.

Several ILEC commenters argue that a uniform rate for broadband pole attachments should apply to ILEC attachments on electric poles.[111] USTA laments that the Petitioners' argument for rate parity is "disingenuous" because it does not extend to ILEC pole owners. The ILECs are wrong. It is the ILECs' arguments that are disingenuous. The statute, reinforced by a decade of Commission precedent and grounded in reasonable policy choices by Congress, shows that ILEC attachments are not eligible for regulated rates. Accepting the plain text of the statute is, of course, hardly "disingenuous."

The Petition pertains only to attachments subject to the Commission's pole attachment jurisdiction. As noted in the Petition, ILEC attachments on electric poles are not subject to the Commission's pole attachment jurisdiction. As explained in detail in comments filed by the Edison Electric Institute and numerous other parties (including cable companies) last year in the Pole Attachment NPRM docket, the plain text, legislative history, and over a decade of Commission and Federal Court precedent all show that Congress had no intent to extend the

[111] VoIP Petition Proceeding, Comments of Verizon at 2 (filed September 24, 2009) ("Verizon Comments") and VoIP Petition Proceeding, Comments of AT&T at 4 (filed September 24, 2009) ("AT&T Comments").

provisions of the Pole Attachment Act to ILEC attachments. As the Commission, and even the ILECs themselves, have repeatedly acknowledged, ILECs are excluded from the definition of "telecommunications carrier" in section 224 and, accordingly, ILECs have no attachment rights under the statute.[112] The Commission could not have stated the matter any more clearly than it did in the 1998 Telecom Order: "Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though *the ILEC has no rights under Section 224 with respect to the poles of other utilities*."[113]

Moreover, there is no sound policy justification for making ILEC attachments eligible for regulated rates under the Pole Attachments Act. As was the case in 1996 when Congress expressly excluded ILECs from the expanded rate protections of section 224, ILECs continue to own significant numbers of poles. ILEC attachments fees are subject to existing joint use and joint ownership agreements which are pervasively regulated by the States under State joint use

---

[112] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order at para. 5, FCC 98-20 13 FCC Rcd 6777 (1998) ("1998 Report and Order"), *aff'd in part, rev'd in part, Gulf Power v. FCC,* 208 F.3d 1263 (11th Cir. 2000), *rev'd & remanded*, *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002); *see, e.g.* 1998 Report and Order at ¶ 19 (stating that "[t]he 1996 Act…specifically excluded incumbent local exchange carriers … from the definition of telecommunications carriers with rights as pole attachers."); *see*, *i.e.*, *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Bell Atlantic at 5-6 (filed September 26, 1997) (stating that "the Act defines a 'pole attachment' as 'any attachment by a cable television system or provider of telecommunications service,' but specifically exempts incumbent local exchange carriers from the definition of a telecommunications carrier."); *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of SBC Communications Inc. at 21 (filed September 26, 1997) (arguing that ILECs should not be attaching entities indicating that the NPRM in the proceeding noted "that the definition of 'telecommunications carrier' … excludes ILECs and that 'pole attachment' therefore does not include an ILEC attachment and stating that "the plain language of § 224 precludes ILEC's from being treated as attaching entities."); *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Ameritech at 11 (filed September 26, 1997) (stating that "[t]he plain language of Section 224(e)(1), coupled with the definition of 'attachment' in Section 224(a)(4) and the exclusion of the ILEC from the definition of 'telecommunications carrier' for purposes of Section 224 requires that ILECs should not be counted as attaching parties.").

[113] 1998 Report and Order at para. 5 (emphasis added).

acts. Any attempt by the Commission to abrogate these existing contracts—whether in whole or with respect to pole attachment compensation terms—would result in massive regulatory confusion and State-Federal disputes in every State in which the Commission currently regulates pole attachments.

Accordingly, consistent with the statute and sound policy, the nondiscrimination mandate of section 224(e) simply does not apply to ILEC attachments.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Electric Utilities respectfully request the Commission should promptly grant the ruling requested in the Petition.

Respectfully submitted,

/s/ Sean B. Cunningham
Sean B. Cunningham
Hunton & Williams LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 778-2225

Counsel to the Electric Utilities

Dated: October 9, 2009